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No. 07-

IN THE

Supreme Court of the United States

WILLIAM SCOTT DOHAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

G. RICHARD STRAFER *
G. RICHARD STRAFER, P.A.
201 South Biscayne Boulevard
Suite 1380
Miami, FL 33131
(305) 374-9091

* Counsel of Record

April 2, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED FOR REVIEW

I. Should the Court Resolve the Conflict In the Circuits About Whether, Or Under What Circumstances, a Prosecutor's Knowing Use of Perjured Testimony and Exploitation Of that testimony in the Prosecutor's Summation Violates Due Process and, If So, Whether That Violation Can Be Excused By a Defense Attorney's Knowledge of or Negligent Failure to Discover the Perjury?

II. Whether the Court Should Resolve the Split in the Circuits Concerning Whether It is Impermissible "Vouching" for a Prosecutor to Imply to a Jury That (A) She Has "Checked" and Verified a Witness's Testimony and (B) the Presiding Federal Judge Must Have Believed the Witness's Testimony Because the Same Judge Previously Granted the Witness a Sentence Reduction Under FED. R. CRIM. P. 35(b) After Hearing It?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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IN THE

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No. 07-___

WILLIAM SCOTT DOHAN,
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

William Scott Dohan ("Dohan") respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in 11th Cir. Case No. 06-14320 on November 28, 2007, and reported at 505 F.3d 989 (11th Cir. 2007) (per curiam).

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and conviction of the United States District Court for the Northern District Florida, is contained in the Appendix A. Dohan's petition for rehearing

en banc was denied on January 3, 2008. *See* Appendix B.

STATEMENT OF JURISDICTION

This Petition was filed within ninety days of January 3, 2008, the date Dohan's Petition for Rehearing was denied. *See* Supreme Court Rule 13. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional provision, the pertinent portions of which is set forth below:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

U.S. Const., Amend. V.

This case also involves the application of FED. R. CRIM. P. 35(b), which provides, in pertinent part:

> (b) Reducing a Sentence for Substantial Assistance.
>
> (1) In General. Upon the government's motion. . . ., the court may reduce a sentence if:
>
> (A) the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person. . . .

STATEMENT OF THE CASE

A. Procedural History

On June 21, 2000, Dohan, Benjamin David Gilliland ("Gilliland"), and nine co-defendants were indicted for

conspiracy to commit wire and securities fraud under 18 U.S.C. § 371 (Count 1) and conspiracy to commit money laundering under 18 U.S.C. §§ 1956(h) and 1957 (Count 2). (DE1.) Gilliland was also charged in 34 substantive counts. (DE1.)[1]

On August 21, 2000, Gilliland entered into a plea agreement with the government. (DE131:7; *see* Appendix C). Gilliland promised to plead guilty to Counts 1 and 2 and "cooperate fully" by, among other things, providing "complete and truthful . . . testimony at . . . trial[s], or as otherwise requested. . . ." (DE131:2-3.) In return, the government promised to: (1) dismiss the 34 substantive counts; (2) refrain from bringing any additional charges; (3) seek, in its discretion, one or more sentence reductions for him under U.S.S.G. § 5K1.1 and/or FED. R. CRIM. P. 35; and (4) not use any of his statements against him so long as "there exists no cause for revocation" of the agreement. (DE131:2-3.) The agreement expressly permitted the government to "revoke this agreement" if Gilliland "fail[ed] to comply with any of [its] terms" and to then reinstate the dismissed counts and use all of Gilliland's statements against him. (DE131:5.) The agreement contained no expiration date.

Between March-April, 2001, eight defendants went to trial, six of whom were convicted (DE484-93),[2] and the Eleventh Circuit subsequently affirmed their convictions. *See United States v. West*, 156 Fed. Appx.

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[1] The Petitioner will refer to the district court record by docket entry ("DE") number, followed by the appropriate page(s).

[2] Dohan was arrested in France but not extradited to Florida until September 2005. (DE:1315, 1321.)

150 (11th Cir. 2005), *cert. denied*, 126 S.Ct. 2878 (2006).

Although Gilliland did not testify in the *West* trial, when Gilliland was sentenced on August 3, 2001, the district court granted the government's motion under § 5K1.1 to reduce his sentence and ordered him to serve 75 months in prison *and 3 years of supervised release*. (DE665; DE669:3.) Two months later, the government returned a 4th superseding indictment, charging Dohan and several new defendants, including Thomas McCrimmon. (DE766.) McCrimmon went to trial in May 2002. (DE961.) When the government again did not exercise its right to compel Gilliland to testify, the jury was unable to reach a verdict and a mistrial was declared. (DE961.) At the retrial, the government finally called Gilliland as a witness and this time McCrimmon was convicted. (DE1070.) *See United States v. McCrimmon*, 362 F.3d 725, 730 (11th Cir. 2004) (affirming McCrimmon's conviction, noting that the "mastermind[]" and "ringleader" of the fraud, "David Gilliland . . . testified"). Following McCrimmon's conviction, the district court granted the government's motion to reduce Gilliland's sentence under Rule 35(b) to 39 months in prison and the same 3 years of supervised release. (DE1174.)

Gilliland served the prison portion of his sentence and was released from prison on September 9, 2003. The next day, he began serving the supervised release portion of his sentence. (DE1486.) He was discharged from supervised release 4 months early, on *May 8, 2006*, approximately 3 months *after* he testified during Dohan's trial. (*Id.*)

Dohan was tried between February 9-23, 2006. On February 23, 2006, he was convicted of both counts and subsequently sentenced to 156 months in prison,

3 years of supervised release and restitution. (DE: 1442, 1502, 1506.)

B. Statement of the Facts

Dohan's trial involved the same ponzi scheme at issue in *West* and *McCrimmon*. In all three trials, the government established that Gilliland and others created Hammersmith Trust, Ltd. ("Hammersmith), and Microfund, LLC ("Microfund) as investment "programs" that Gilliland marketed by claiming that they would produce huge profits while being risk free. (*See, e.g.,* DE1585-86; DE1559:115, 205.) Hammersmith would purportedly buy Treasury Bills and somehow "leverage" them to make the profits, while simultaneously keeping the Bills secure in banks. (DE1528:126-39; DE1580:160-64; DE1558:49-57; DE1560:236-39.) Microfund also offered "high yields" and security.

In fact, both Hammersmith and Microfund were "ponzi" schemes. That is, money obtained from new investors would be misappropriated with a percentage used to satisfy the demands of older investors. (DE1528:283-84; DE1558:227-250; DE1559:23.) Together, these and related entities raised approximately $65 million and repaid investors $40 million, leaving a net loss of approximately $25 million. (DE1560:190-91.)

As in McCrimmon's trial, the principal issue at Dohan's trial was not whether the investment programs *were* ponzi schemes but whether the defendant on trial *knew* that they were at the time the defendant was associated with them.[3] The two prior

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[3] *See McCrimmon*, 362 F.3d at 729 (noting that central issue was not whether Gilliland ran a multi-million dollar ponzi

trials involving the scheme—*West* and *McCrimmon*—involved defendants who were actively engaged in selling the programs directly to investors and who made millions from the scheme. Dohan did not market the programs and had little contacts with investors. His job was to find ways to invest a portion of the funds obtained through the programs, and it is undisputed that for all but a few months of the four years (1996-1999) that the scheme operated, Dohan was in foreign countries looking for investment pro-grams—not in Florida where the scheme was centralized. (DE1521:4-5; DE1528:62, 87, 90; DE1580:160, 162, 166, 170, 173, 175, 177; DE1558:184, 219-20; DE1559:16; DE1560:78-79.) The evidence also established Dohan returned the entire $8.4 million he had received from Hammersmith and Microfund before he learned about the first legal inquiry into the scheme. (DE1529:74-77; DE1562:49; DE1563:53-61.)

At least one third of the trial (from Day 3 through half of Day 5) consisted of Gilliland's testimony. Gilliland, the only "insider" witness to testify, claimed that Dohan was really the "financial guru" of the scheme, not him. (DE1558:232.) It was Dohan, according to Gilliland, who "usually drafted most of the paperwork" used in the scheme. (DE1558:236.) It was Dohan, according to Gilliland, who came up with the numbers when it came to dividing up the money. (DE1559:40, 50.) And, Gilliland repeatedly testified that Dohan *knew* all the criminal aspects of the scheme. (DE1558: 227. 243, 250; DE1559: 22-23, 49, 51.)

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scheme but whether McCrimmon "*knew* the Hammersmith program was a fraud") (emphasis added.)

The testimony also established that Gilliland was a serial perjurer. He had lied in civil depositions, to a court-appointed receiver and to banks. (DE1559:191-92; DE1560:29, 57-58.) He created and filed false documents in a bankruptcy proceeding to avoid being held in contempt. (DE1559:199-202, 206; DE1560:171-72.) When that did not work, he committed perjury at the ensuing contempt hearing. (DE1559:187-208; DE1560:171-72.) He not only "told the Court a number of lies" but he also "generated" false documents to "substantiate" his lies, including a fictitious story about how he was attempting to come up with the money. (DE1559:187- 88, 213-16.) Finally, Gilliland admitted that his perjury included false accusations against Dohan. (DE1559:213-14; DE1560:89-93.) However, he claimed his lying stopped when he decided to cooperate with the government. (DE1560: 132.) To make Gilliland appear credible, despite his admitted perjury, the prosecutor used several tactics.

As noted above, by the time Dohan went to trial, Gilliland had served the prison portion of his sentence but was still on supervised release. The prosecutor began her direct questioning of Gilliland by briefly eliciting testimony about his guilty plea, sentence and sentence reduction. (DE1558: 162-64.) She then elicited that Gilliland was allegedly testifying "on [his] own volition" and because of a trial subpoena to do so—*not* because the government still had any hold over him:

> Q. And at this point in time, what could you or are you expecting in return for your testimony here today?
>
> A. Nothing.

Q. Why is that?

A. Well, there is nothing else that the government really would have to offer for me as far as that side is concerned and *I'm really just here more on my own volition* in the sense of the way that I feel about [what] transpired in the decisions that I made.

Q. Other than the fact that you're under subpoena, correct?

A. Yes.

(DE1558:164; emphasis added.) Defense counsel, apparently not comprehending that Gilliland's plea bargain was still in effect since he was still on supervised release, did not cross-examine Gilliland about the prosecutor's ability to void the plea agreement[4] if he did not comply with her demand for testimony against Dohan.

On redirect, the prosecutor focused on Gilliland's sentence reduction, eliciting not only that it was "Judge Collier," the same judge who was presiding over Dohan's trial, who had granted it but that Judge Collier had done so *only* after personally seeing and hearing Gilliland testify in the prior trials:

Q. And who actually decided when you were going to get out of jail?

A. Judge Collier.

Q. And when that occurred, did that occur based upon a notice by the United States to the Court?

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[4] *See, e.g., United States v. Tarrant*, 730 F. Supp. 30, 32-33 (N.D. Tex. 1990).

A. I believe there was a petition filed on my behalf.

Q. *And at that point in time had the Court—had you also testified under oath in this court.*

A. *Yes, ma'am.*

(DE1560:126-127; emphasis added.) After thus implying that the presiding judge must have believed Gilliland (or he would not have granted the reduction), the prosecutor injected herself into the credibility equation:

Q. Did you have the impression at that point in time [after deciding to cooperate] that you could get away with lying to us? In other words, *did you believe that you could tell us something that wasn't true* and *we would not be able to catch you*?

A. *No, I believed that you [the prosecutor] would check everything that I said at least three ways.*

Q. *Was it your understanding that that's exactly what happened*?

A. *My understanding, yes, ma'am.*

(DE1560:127-28; emphasis added.)

During her summation, the prosecutor told the jury that "our goal . . . here is to figure out whether or not Mr. Dohan *knew* that the fraud was being perpetrated when he was making misrepresentations to the victims in this case." (DE1563:121; emphasis added.) Two pages later, she used Gilliland's testimony to answer this question: "Mr. Gilliland testified to you that *everyone knew* up front, *including Mr.*

Dohan, that what they had to do to get this program off the ground was Ponzi." (DE1563:123; emphasis added.) Then, since defense counsel had not objected to her methods of rehabilitating Gilliland, the prosecutor argued to the jury:

> "*I believe what [Gilliland] said was corroborated*, what he said made a lot of sense, and *he had absolutely no reason to lie to you. He had no reason to even be here other than the fact that he was under oath. He had no obligation to be here.*
>
> [Defense counsel] talked a lot about agreements between the government and Mr. Gilliland. There wasn't any. *There was no agreement between Mr. Gilliland and the government that created a situation where he had to come to testify. Nothing. It's gone. It's done.* He's done his time, and he came and he endured days of what had to be torture to get the story out. And the story made sense.

(Day10:173-74; emphasis added.)

C. The Eleventh Circuit's Decision

In his direct appeal in the Eleventh Circuit, Dohan raised two principal arguments. First, he argued that the prosecutor violated his right to Due Process and a string of decisions from this Court, *see* pp. 13-14 *infra*, by knowingly eliciting perjury, *i.e.*, Gilliland's claim that he was testifying on his own "volition" and only because he was being compelled to do so by a subpoena. Dohan further argued the prosecutor exacerbated this misconduct in her summation by arguing that Gilliland had "no reason" and "no obligation to be here" because the plea agreement was "gone" and "done." The Eleventh

Circuit rejected Dohan's argument, flatly ruling that the conduct did not even amount to "error" and "certainly" not plain error. App. B: [3].

Second, Dohan argued that the prosecutor had similarly violated his right to due process during her redirect of Gilliland by using both her own alleged beliefs about Gilliland's veracity, as well as those of the presiding judge, to impermissibly vouch for Gilliland. He thus argued that the prosecutor injected her own beliefs into the case by eliciting Gilliland's testimony that he not only *believed* that the prosecutor would "check" his testimony "at least three ways" *but that, in fact, she had done so.* Similarly, Dohan argued that the prosecutor improperly used the sentence reduction procedures in Rule 35(b)(1), to imply that the presiding judge believed Gilliland—a relatively new form of vouching[5] that at least two other circuits have specifically condemned. *See United States v. Rudberg*, 122 F.3d 1199 (9th Cir. 1997); *United States v. Harlow*, 444 F.3d 1255 (10th Cir. 2006). However, the Eleventh Circuit summarily held that "neither" of Dohan's claims of vouching "were improper". . . . We find *no error.*" App. B: [4] (emphasis added). Nor, the court added, was Dohan sufficiently prejudiced by the misconduct. *Id.*

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[5] As discussed *infra*, this form of vouching is an outgrowth of the procedures for obtaining a sentence reduction for "substantial assistance" under U.S.S.G. §5K1.1 and FED. R. CRIM. P. 35(b).

REASONS FOR GRANTING THE WRIT

I. The Court Should Grant This Petition To Resolve the Conflict In the Circuits About Whether, or Under What Circumstances, a Prosecutor's Knowing Use of Perjured Testimony and Exploitation of That Testimony In Summation Violates Due Process and, If So, Whether That Violation Can Be Excused By the Defense Attorney's Knowledge of or Negligent Failure to Discover the Perjury.

A. Introduction

It has been a bedrock principle of this Court's precedents for over half a century that when a prosecutor *knowingly* uses and exploits the perjured testimony of a prosecution witness not only is the defendant's right to due process violated but the very fabric of the criminal justice system is compromised. Since the Court last addressed this issue in *Giglio v. United States*, 405 U.S. 150 (1972), a split in the circuits has developed as to (1) whether the conduct of the defendant's own attorney in failing to object to or reasonably discover the prosecutor's falsehood matters at all and (2) if so, whether the defense counsel's conduct matters only when it is itself consciously made for a tactical reason, or whether defense counsel's mere negligence in failing to use or even reasonably discover the falsehood is enough to nullify the misconduct. As demonstrated below, the Court should grant this Petition to end the nationwide confusion and hold that a prosecutor's deliberate effort to subvert a trial with perjury cannot be condoned by the negligent failure of the defendant's attorney to object to or discover the misconduct in time to cure it.

B. A Prosecutor Who Knowingly Uses, Knowingly Exploits or Fails to Correct False Testimony Deprives the Accused of "Fundamental Fairness" in the Judicial Process

Over 70 years ago, this Court held in *Mooney v. Holohan*, 294 U.S. 103 (1935) (per curiam), that "the presentation of testimony known to be perjured" is "inconsistent with the rudimentary demands of justice" and thus violates Due Process, a term said to embody "the fundamental conceptions of justice which lie at the base of our civil and political institutions." *Id.* at 112. Over the years, the Court has built on and repeatedly cited *Mooney* as authoritative. Thus, in *Pyle v. Kansas*, 317 U.S. 213 (1942), the Court held that allegations that a prosecutor used perjured testimony and suppressed evidence stated a Due Process violation. Fifteen years later, applying "the general principles laid down by this Court in" *Mooney* and *Pyle*, the Court granted a habeas petition, holding that a prosecutor must not only refrain from soliciting perjured testimony but must also correct testimony known to be perjured. *Alcorta v. Texas*, 355 U.S. 28, 31 (1957). That principle was reaffirmed in *Napue v. Illinois*, 360 U.S. 264, 265 (1959), and applied where the prosecutor "did nothing to correct" a witness's testimony that created a false impression, though not perjured, that the witness "had received no promise of consideration in return for his testimony." *Mooney*, *Pyle* and *Napue* were followed by and formed the basis of the Court's holding in *Giglio v. United States*, 405 U.S. 150, 154-55 (1972), that the prosecution's chief witness's uncorrected false testimony that he had received no promises for prosecutorial leniency in exchange for his testimony violated Due Process and required a new trial.

More recently, the Court has emphasized that it is not just the defendant's rights that are stake when a prosecutor violates these principles. In *United States v. Agurs*, 427 U.S. 97, 107 (1976), the Court recognized that presenting false testimony "involve[s] a corruption of the truth-seeking function of the trial process." In *California v. Trombetta*, 467 U.S. 479, 485 (1984), the Court also recognized that a prosecutor has a "constitutional obligation to report" to both the defendant and "to the trial court whenever government witnesses lie under oath." *See, e.g., Mesarosh v. United States*, 352 U.S. 1 (1956) (reversing convictions based on Solicitor General's motion and statements that government witness had committed perjury in other proceedings).

The importance of prosecutorial veracity as a core value encompassed within the Due Process Clause is also demonstrated in this Court's decisions holding that a prosecutor's improper argument can violate the Due Process rights of a defendant. *Miller v. Pate*, 386 U.S. 1 (1967) (finding that a deliberate misrepresentation of truth to a jury is a violation of due process); *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (finding that an uncorrected, misleading statement of law to a jury violated due process); *Darden v. Wainwright*, 477 U.S. 168, 181-82 (1986) (improper argument and manipulation or misstatement of evidence).

Collectively, the "false testimony" and "improper argument" decisions of this Court set a clear rule: A prosecutor's failure to correct false testimony, especially when coupled with a summation exploiting the false testimony, creates an unacceptably high risk to the integrity of the judicial process. *See also Albright v. Oliver*, 510 U.S. 266, 299 (1994) (Stevens,

J., and Blackmun, J., dissenting) ("[e]ven if prescribed procedures are followed meticulously, a criminal prosecution based on perjured testimony . . . simply does not comport with the requirements of Due Process").

The remedy for such conduct was established by the Court in *Mooney* and reiterated in *Agurs*. Where the prosecution's case includes the knowing use of perjured testimony, reversal is required "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Agurs*, 427 U.S. at 103. *See also Kyles v. Whitley*, 514 U.S. 419, 433 n. 7 (1995) (reaffirming the *Agurs* standard).

C. The Circuit Split Over the Relevance of Defense Counsel's Knowledge

1. This Court's Opinions.

None of this Court's precedents discuss the relevance of defense counsel's conduct or knowledge as it relates, if at all, to the independent duties imposed on the prosecutor to correct and not exploit false or misleading testimony. In *Mooney*, the Court noted that Mooney "*alleges* that he could not *by reasonable diligence have discovered* prior to the denial of his motion for a new trial, and his appeal to the Supreme Court of the State, the evidence which was subsequently developed and which proved the testimony against him to have been perjured." *Mooney*, 294 U.S. at 110. However, the Court did not elaborate on whether or why defense counsel's diligence, or lack thereof, would have any bearing on a prosecutor's deliberate deception of the jury and the court and none of the Court's subsequent decisions hint at the answer.

In *Alcorta*, the Court specifically noted that prosecutor had deliberately omitted the pertinent information from discovery and did not discuss whether defense counsel could or should have discovered it anyway. *Alcorta*, 355 U.S. at 31. Similarly, in *Miller*, where the prosecutor falsely portrayed a stain on a pair of underwear as blood, defense counsel's pretrial motion for a scientific test on the substance was resisted by the prosecutor and denied by the trial court. *Pate*, 386 U.S. at 2, n. 1. The issue was not mentioned at all in *Napue* and *Giglio*, presumably because it was clear that defense counsel did not know and could not have independently discovered the prosecutors' concealed deal-making.

2. The Conduct or Knowledge of Defense Counsel as "Irrelevant".

Every circuit has now weighed in on the issue of whether or when defense counsel's inaction is relevant in this context and the result is, as demonstrated below, utter chaos.

Two circuits, the Eighth and Ninth, have held that defense counsel's knowledge or possession of information that would or should have exposed the falsehood is "irrelevant," *Comm. Of the Northern Mariana Is. v. Bowie*, 243 F.3d 1109, 1122 (9th Cir. 2001), and "of no consequence," *United States v. Foster*, 874 F.2d 491, 495 (8th Cir. 1988). Both circuits based their rulings on the important and over-riding function of a prosecutor to the integrity of the criminal justice system. As the Ninth Circuit explained in *Bowie*:

> What may have served Bowie's purposes in trial is different and distinct from the duty of the prosecution to protect the trial process against fraud. Viewed in this light, what Bowie did in

> court with [the discovery] is *irrelevant*. He had certain constitutional rights that he could waive or forfeit, *but he could not waive the freestanding ethical and constitutional obligation of the prosecutor as a representative of the government to protect the integrity of the court and the criminal justice system*, as established in *Mooney* and *Berger* [*v. United States*, 295 U.S. 78, 88 (1935)].

Bowie, 243 F.3d at 1122 (emphasis added).

The Ninth Circuit reaffirmed this position in *Belmontes v. Brown*, 414 F.3d 1094 (9th Cir. 2005), *rev'd on other grounds*, 127 S.Ct. 1042 (2007). In *Belmontes*, a prosecution witness gave false and misleading testimony that he had never been "busted" before. In fact, he had two prior convictions. However, the State argued that it had no duty to correct the false testimony because "defense counsel was notified of the [arrest] at a pretrial hearing." *Belmontes*, 414 F.3d at 1115. The Ninth Circuit rejected the "waiver" argument, holding:

> *Whether defense counsel is aware of the falsity of the statement is beside the point.* The state overlooks the fact that the prosecutor's duty to correct false testimony arises, not simply out of a duty of fairness to the defendant, but out of "the freestanding constitutional duty of the State and its representatives to protect the system against false testimony." [Citation omitted.] *Therefore, regardless of whether defense counsel should have known* that a state witness testified falsely, "[a] prosecutor's responsibility and duty to correct what he knows to be false and elicit the truth,' *Napue*, 360 U.S. at 269-0 . . ., requires [him] to act when put on notice of the real possibility of false testimony."

Id. at 1115 (emphasis added; citing *Bowie*). *Accord Foster*, 874 F.2d at 495 ("[t]he fact that defense counsel was also aware of the [immunity] letters and failed to correct the prosecutor's misrepresentation is of no consequence" and "did not relieve the prosecutor of her overriding duty of candor to the court, and to seek justice rather than convictions").

3. Conduct Relevant When Motivated By a "Conscious Defense Strategy"

All of the other circuits that have addressed this issue have found that defense counsel's knowledge or conduct to be relevant to the issue *sometimes*. However, these circuits differ wildly on when counsel's knowledge, coupled by inaction in the face of that knowledge, will excuse the prosecutor's deliberate use or exploitation of perjury.

The District of Columbia, Second, Third, Fifth and Seventh Circuits have expressly held that this strain of prosecutorial misconduct may be excused where the defense attorney (1) has full and actual knowledge of the falsehood, (2) fails to object or take steps to cure it, *and* (3) when counsel's inaction is motivated by a "conscious defense strategy." *Ross v. Heyne*, 638 F.2d 979, 986 (7th Cir. 1980) (reaffirming *United States v. Evans*, 408 F.2d 369 (7th Cir. 1969)).[6] *See also United States v. Iverson*, 648 F.2d

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[6] The type of conduct by defense counsel in this sub-category of opinions is best understood as "waiver" rather than "forfeiture." This distinction is important:

> Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right." [Citations omitted.] Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are

737, 739, n. 8 (D.C. Cir. 1981) (opinion on rehearing) (agreeing with this aspect of *Ross*); *United States v. Harris*, 498 F.2d 1164, 1171 (3rd Cir.) (excusing misconduct where the court viewed counsels' conduct as an attempt to "profit from their inactivity"), *cert. denied*, 419 U.S. 1069 (1974), *Beltran v. Cockrell*, 294 F.3d 730, 735-36 (5th Cir. 2002) (Beltran "waived" his right to object to even the prosecutor's summation that repeated the false testimony because defense counsel's failure to object or use the available evidence to expose the falsehood was "part of a deliberate defense strategy" since counsel "was aware that the testimony was misleading but consciously decided not to clarify [it] for the jury,"); *Jenkins v. Artuz*, 294 F.3d 284, 295 (2d Cir. 2002) (reversing conviction where defense counsel's inaction was not due to any "strategic or tactical omission").[7]

The Seventh Circuit in *Ross*, expressly limited the "waiver" to deliberate conduct by counsel that was part of counsel's trial strategy. In *Ross*, defense counsel's decision not to use the information (knowledge that a key witness was testifying pursuant to a plea agreement) was "conscious." *Ross*, 638 F.2d at 986. However, it did not relate to any trial defense. Rather, counsel's decision not to reveal the truth was due to a concern that the information had been

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> required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake. [Citations omitted.]

United States v. Olano, 507 U.S. 725, 733 (1993).

[7] As discussed *infra*, several other circuits, without specifically endorsing waiver by "conscious defense strategy," would presumably agree with this principle since they extend the "waiver" to include "forfeiture" through merely negligent inaction (a failure to object) by defense counsel.

obtained from his law partner who had previously represented the witness. *Id.* at 986. Despite the fact that defense counsel had actual knowledge of the falsehood and acted deliberately, since the inaction was not attributable to a trial tactic that was for the defendant's benefit, the Seventh Circuit did not excuse the prosecutor's conduct on the basis of an implied defense "waiver" and reversed the conviction. *Id.* at 986-87.

In *Iverson*, the District of Columbia Circuit agreed with this aspect of *Ross*. The court initially read *Ross* broadly to stand for the proposition that "absent unusual circumstances, the right of the defendant to disclosure by the prosecutor is deemed waived if defense counsel with actual knowledge of the [false testimony] chooses not to present such information to the jury." *Iverson*, 648 F.2d at 739. However, the court then endorsed the distinction made in *Ross* between a "conscious defense strategy" and the attorney's conflict of interest and remanded for an evidentiary hearing on *why* defense counsel did not use the known information. *Id.* at 739, n. 8 (discussing *Ross*). Unlike *Ross*, however, *Iversion* expressly left open whether "due process requires a new trial when the defense counsel *did not know, but should have known*, about the false evidence, as, for example, when the matter is on the public record. . . ." *Id.* at 739, n. 9 (emphasis added).

4. Negligent Conduct By Defense Counsel With Knowledge Irrelevant.

The Second Circuit has addressed the issue left open in *Iverson* by drawing a *sui generis* distinction between the types of false testimony that would trigger a waiver. Where "the prosecutor was 'directly involved as a participant in the transaction about

which the witness has allegedly lied'"—as when a witness denies having a plea agreement with the prosecutor (or the prosecutor's office)—the Second Circuit has repeatedly reversed convictions despite the fact that defense counsel had varying degrees of knowledge concerning the existence of a plea agreement. *See Shih Wei Su v. Filion*, 335 F.3d 119, 127-128 & n. 4 (2d Cir. 2003) (reversing conviction where the prosecutor allowed a witness's false denial of an agreement go uncorrected and then "bolstered [the witness's] credibility in summation" despite the fact that defense counsel had reasons to believe a deal existed; to exercise due diligence, defense counsel did not have to assume the prosecutor was lying), citing *Strickler v. Greene*, 527 U.S. 263, 286-87 (1999) (recognizing that it is "reasonable" for trial counsel to rely on the "presumption . . . that prosecutors have fully discharged their official duties" and do not have to "assert constitutional error on the basis of a mere suspicion that some prosecutorial misstep may have occurred"); *Jenkins v. Artuz*, 294 F.3d 284, 2959 (2d Cir. 2002) (reversing conviction where a prosecution witness falsely denied the existence of a plea agreement and prosecutor repeated falsehood in summation, despite the fact that defense counsel had been told pretrial about the agreement since inaction by counsel was not attributable to any "strategic or tactical omission[s]" by defense counsel). *See also Mills v. Scully*, 826 F.2d 1192, 1195 (2d Cir. 1987); *United States v. Valentine*, 820 F.2d 565, 571 (2d Cir. 1987); *United States ex rel. Washington v. Vincent*, 525 F.2d 262, 268 & n. 8 (2d Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

Conversely, when the falsehood is not the product of the prosecutor's creation, the Second Circuit employs a different rule. For example, where the

falsehood involves the meaning of documents, the Second Circuit considers defense counsel's failure to exercise "due diligence" as fatal to the Due Process claim. *See United States v. Helmsley*, 985 F.2d 1202, 1205-06 (2d Cir. 1993).

5. Negligent Inaction By Defense Counsel Viewed as a Waiver

Six other circuits, the First, Third, Fourth, Fifth, Sixth and Tenth Circuits, have construed the issue left open by *Iverson* differently. None recognize the distinction made by the Second Circuit concerning the party who created the falsehood and have all broadly excused prosecutors for knowingly using perjured testimony even when defense counsel's lapse was neither deliberate nor for any plausible defense strategy. In this category, the First Circuit is the most extreme, excusing a prosecutor's conduct because defense counsel *should have known* that the testimony was false and holding that where defense counsel knows the information but fails to use it, there arises an "*assumption* . . . that [defense counsel] did so for *strategic* reasons." *United States v. Mangual-Garcia*, 505 F.3d 1, 10-11 (1st Cir. 2007).

The Third, Fourth, Fifth, Sixth and Tenth Circuits do not base their decisions on the creation of any "assumption[s]" but flatly hold that inaction by defense counsel, whether due to oversight or negligence, is enough to "waive" any complaints about the prosecutor's deliberate misconduct. *See, e.g., Harris*, 498 F.2d at 1167-69 (holding that the defendants waived the otherwise reversible error because, after learning of the misconduct before the completion of the trial, defense counsel took no "corrective action"); *United States v. Meinster*, 619 F.2d 1041, 1045 (4th Cir. 1980) (where "[d]efense counsel took no further

action" despite access to information that would have exposed the falsehood, counsel's counsel's lack of diligence "waived" the misconduct); *United States v. Bethley*, 973 F.2d 396, 399 (5th Cir. 1992) (rejecting *Napue* violation when government provided the defendant with the witness's rap sheets and plea agreement in related case but counsel failed to ask questions regarding the witness's denial of past convictions); *Byrd v. Collins*, 209 F.3d 486, 517 (6th Cir. 2000) (holding that where evidence of the falsehood "should have been obvious" to defense counsel who did not expose it, the prejudice to the defendant "was no fault of the State"), *cert. denied*, 531 U.S. 1082 (2001); *United States v. Crockett*, 435 F.3d 1305, 1318 (10th Cir. 2006) (holding that "*Napue* is inapposite" where "[t]he government had disclosed [the] impeachment evidence"). *See also United States v. Pacheco*, 451 F.2d 1000 (10th Cir. 1971) (where witness denied ever having been indicted, no violation where defendant's "attorney knew" that "charges of some kind" had been filed against the witness).

However, the Fifth Circuit's opinion in *Bethley* appears to conflict with two earlier Fifth Circuit opinions. *See United States v. Bartram*, 595 F.2d 231, 243, n. 17 (5th Cir. 1979) (although documents turned over in discovery included the terms of the witness's deal, when the prosecutor's questions "reinforced the deception and thereby contributed to the deprivation of due process," defense counsel's failure to review or remember the documents did not excuse the misconduct); *United States v. Sanfilippo*, 564 F.2d 176, 179 (5th Cir. 1977) (reversing conviction where despite the fact that "weeks before trial, the prosecutor satisfied his obligation under *Giglio* to fully disclose the terms of the plea bargain," where the prosecutor both permitted the false testimony and utilized it in

summation). And, the opinions in *Harris Meinster* and *Byrd* were rendered over vigorous dissenting opinions echoing the sentiments behind the Eighth and Ninth Circuit's opinions. *See, e.g., Harris*, 498 F.2d at 1173 (Seitz, J., dissenting from denial of rehearing) (when a prosecutor "fails . . . to remedy a material misstatement he knows to be false, the prosecutor has violated his duty to insure defendants a fair trial" and, therefore, "I do not see how defense counsel's failure to correct testimony known to the prosecutor to be false can waive a defendant's right to a fair trial . . . The solution reached by the panel encourages game-playing by government attorneys; I would rather we encouraged them to preserve defendants' right to a fair trial"); *Meinster*, 619 F.2d at 1050 (Murnaghan, J., dissenting) (disagreeing with the view that the misconduct could be overlooked because "defense counsel were assiduous enough to turn up" evidence revealing the perjury but did not use it); *Byrd*, 209 F.3d at 543 (Jones, R., dissenting) (disagreeing with the argument that prosecutor's failure to correct false testimony was excused because "an effective counsel" should have construed from witness's arrest record, that was disclosed in discovery, that he was still on parole).

Before the instant case, the Eleventh Circuit agreed with *Iverson, Ross*, and *Meinster* that "[t]here is no violation of due process resulting from prosecutorial non-disclosure of false testimony if defense counsel is aware of it and fails to object." *Routley v. Singletary*, 33 F.3d 1279, 1286 (11th Cir. 1994), *cert. denied*, 515 U.S. 1166 (1995). In *Routley*, however, there was no indication that the prosecutor exploited the false testimony in summation. In *DeMarco v. United States*, 928 F.2d 1074, 1076 (11th Cir. 1991), where a prosecutor *did* exploit the misconduct in

summation, the Eleventh Circuit declined to excuse the misconduct when defense counsel had a discovery letter that referred to the existence of a deal with a key witness but counsel did nothing when the witness testified on cross-examination that he had no deal. *DeMarco*, 928 F.2d at 1075. Under these circumstances, the court found that the *Iverson* line of authority was "[d]istinguish[ed]" because *DeMarco* had "the added important factor that in the prosecutor's summation to the jury, she not only adopted [the witness's] perjured testimony, but capitalized on it." *DeMarco*, 928 F.2d at 1076 (relying on *Sanfilippo*).

The decision in *Dohan* has apparently eliminated the *DeMarco* caveat. Whether from negligence or simple inadvertence, Dohan's counsel failed to apprehend the significance of the fact that Gilliland was still bound by the plea agreement since he was still on supervised release. There was no apparent or plausible defense "strategy" that would have benefitted from allowing the jury to believe that the government no longer had any hold over Gilliland. Yet, as in *DeMarco*, the prosecutor was not content with just leaving the false testimony uncorrected. She fully exploited it in closing by falsely and deliberately told the jury a blatant lie—that Gilliland's plea agreement was "gone" and "done" and that "[h]e had no obligation to even be here." The Eleventh Circuit has now endorsed that conduct, finding "no error" at all in either eliciting the false testimony or in expanding upon the deception in closing. The same misconduct would, albeit not always for the same reasons, be reversible error in the Ninth Circuit (*Bowie* and *Belmontes*), the Eighth Circuit (*Foster*), the Seventh Circuit (*Ross*), the Second Circuit (*Jenkins* and *Shih Wei Su v. Filion*), the Fifth Circuit (*Sanfilippo*) and even in the Eleventh Circuit before

Dohan (*DeMarco*).[8] The Eleventh Circuit's opinion in *Dohan* is arguably consistent with the positions of the First Circuit (*Mangual-Garcia*), Fourth Circuit (*Meinster*) and the Sixth Circuit (*Byrd*). Since defense counsel's lapse in *Dohan* was not part of any "conscious defense strategy," it would not necessarily be condoned by the Third Circuit (*Harris* majority opinion) or the District of Columbia Circuit (*Iverson*), neither of which have clearly expressed an opinion on the issue where defense counsel's inaction was only attributable to negligence or oversight.

D. The Proper Resolution of the Circuit Split.

Now that every circuit is on record, the Court should grant the Petition and resolve the split by endorsing the position of the Eighth and Ninth Circuits that defense counsel's knowledge or conduct is "irrelevant" to whether a prosecutor has a "free-standing ethical and constitutional obligation . . . as a representative of the government to protect the integrity of the court and the criminal justice system. . . ." *Bowie*, 243 F.3d at 1122. Prosecutors are not "ordinary part[ies] to a controversy" but serve as critical "representative[s]" of the "sovereignty," which have the "obligation to govern impartially" and ensure "that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). As this Court recognized in *Mooney*, that obligation is broken when a prosecutor *knowingly* uses perjury to secure a conviction:

> [The] requirement [of Due Process], in safeguarding the liberty of the citizen against deprivation

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[8] *Dohan* would also conflict with Judge Seitz's dissenting opinion in *Harris*, Judge Murnaghan's dissenting opinion in *Meinster* and Judge Jones' dissenting opinion in *Byrd*.

> through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. [Citation omitted.] It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.

Mooney, 294 U.S. at 112. *See also Strickler v. Greene*, 527 U.S. 263, 281 (1999) (noting "the special role played by the American prosecutor in the search for truth in criminal trials") (citations omitted); *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985) ("the prosecutor's role transcends that of an adversary"); *Giles v. Maryland*, 386 U.S. 66, 98 (1967) (Fortas, J. concurring) (prosecutors, as "ministers of justice," have the obligation to seek truth).

Nor should federal courts condone the corruption of the system by government sponsored perjury by shifting the blame to defense counsel for not discovering and exposing in a sufficiently timely fashion. The inherent danger in permitting prosecutors to discharge their Constitutional obligations merely by including *something* in discovery that a diligent attorney might, or might not, appreciate is obvious. This Court soundly rejected a similar contention in the *Brady* context in *Banks v. Dretke*, 540 U.S. 668, 695-96 (2004):

> Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed. As we observed in *Strickler*, defense counsel has no "procedural obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred." [Citation omitted.]. . . The State here nevertheless urges, in effect, that "the prosecution can lie and conceal and the prisoner still has the burden to . . . discover the evidence, Tr. Of Oral Arg. 35, so long as the "potential existence" of a prosecutorial misconduct claim might have been detected, *id.*, at 36. A rule thus declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendants due process.

A rule that rewards a prosecutor for successfully hoodwinking defense counsel also conflicts with this Court's "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat v. United States*, 486 U.S. 153, 160 (1988). The Court has a duty "to see that the waters of justice are not polluted" by perjury, *Mesarosh*, 352 U.S. at 14, that should transcend any duty artificially imposed on a defendant's own attorney to discover and expose it. This Court has held that even some statutory rights cannot be waived by a defendant due to the societal interest in the right at stake. *See Zedner v. United States*, 547 U.S. 489, 500-501 (2006) (holding that since the Speedy Trial Act was not "designed solely to protect a defendant's right to a speed trial, but also "with the public interest firmly in mind," a defendant

does not have the right to "opt out of the Act entirely" through "mere consent or waiver"). Surely, the right to be tried in federal court through a process untainted by the *deliberate* use and exploitation of perjured testimony by an Assistant United States Attorney cannot be "waived" by the failure of the defendant's attorney to recognize, for whatever reason, the prosecutor's misconduct.

II. The Court Should Grant This Petition To Resolve the Split in the Circuits Concerning Whether It is Impermissible "Vouching" for a Prosecutor to Imply to a Jury That (A) She Has "Checked" and Verified a Witness's Testimony and (B) the Presiding Federal Judge Must Have Believed the Witness's Testimony Because the Judge Previously Granted the Witness a Sentence Reduction After Hearing It.

Standing alone, a prosecutor's comments in summation can "so infect [a] trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181(1986). Although the line between zealous advocacy and prosecutorial misconduct can sometimes be murky, at least until *Dohan*, there was no dispute about one rule: A prosecutor may not personally "vouch" for the credibility of a witness because vouching "carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *United States v. Young*, 470 U.S. 1, 18-19 (1985). The prosecutor in this case committed two conceptually distinct forms of improper vouching, neither of which the Eleventh Circuit in *Dohan* believed even rose to the level of "error."

First, the prosecutor explicitly placed her own personal beliefs, and by implication "the imprimatur of the Government," behind Gilliland by eliciting from him on re-direct that she herself had "check[ed] everything" Gilliland said about Dohan "at least three ways." Until the Eleventh Circuit's blessing of such an argument in *Dohan*, every circuit that has reviewed the propriety of a similar argument has condemned it.

For example, in *Gradsky v. United States*, 373 F.2d 706 (5th Cir. 1967), the prosecutor told the jury in summation that prosecutors "don't put on a witness" unless they have had the opportunity "*to check out* and to judge the credibility and truthfulness" of the witness before trial. *Gradsky*, 373 F.2d at 710 (emphasis added). In condemning this argument, the Fifth Circuit found that:

> Here, it is impossible to construe the language used by the prosecution attorney in any way other than saying that the government had run a check on these two witnesses and had concluded on the basis of such check, obviously out of the ken of the jury, that they were speaking the truth.

Id. In reversing Gradsky's conviction, the Fifth Circuit emphasized that the prejudice from the improper vouching was particularly great because the case largely "depend[ed] upon the jury's accepting as true the statements" of witnesses vital to the government's case. *Gradsky*, 373 F.2d at 709. That, of course, was precisely the case here as well. Other circuits have uniformly condemned similar arguments. *See, e.g., United States v. Harlow*, 444 F.3d 1255, 1263 (10th Cir. 2006) (improper for government to use its role in seeking sentence reductions for

witnesses under Fed. R. Crim. P. 35(b) to imply "that the government has verified the truthfulness of the witness and believes that his ongoing testimony is truthful"); *United States v. Collins*, 415 F.3d 304, 308 (4th Cir. 2005) (improper vouching occurs when a prosecutor "'explicitly or implicitly indicat[es] that she can monitor and accurately verify the truthfulness of the witness' testimony'"), quoting *United States v. Bowie*, 892 F.2d 1494, 1498 (10th Cir. 1990); *United States v. Roberts*, 618 F.2d 530, 536 (9th Cir. 1980) ("[t]he prosecutor may not tell the jury that the government has confirmed a witness's credibility") (citing *Gradsky*); *United States v. Boyce*, 797 F.2d 691, 694 (9th Cir. 1986) (improper for prosecutor to suggest that he had "confirmed [the witness's] testimony"); *United States v. Hilton*, 772 F.2d 783 (11th Cir. 1985) (agreement to submit to a polygraph test improper); *United States v. Arroyo-Angulo*, 580 F.2d 1137, 1150 (2d Cir. 1978) (Friendly, J., concurring) (a prosecutor may not "give jurors the impression that the prosecutor is carefully monitoring the testimony of the cooperating witness to make sure that the latter is not stretching the facts").

Second, the prosecutor committed an even more egregious form of vouching by implying that the *presiding federal judge* had previously heard and credited Gilliland's testimony because the judge had agreed (with the government) to significantly reduce his sentence. The Eleventh Circuit's acceptance of this tactic—a tactic that could be employed routinely under the sentence-reduction regime created by U.S.S.G. §5K1.1 and Rule 35(b)—stands squarely in conflict with decisions from both the Ninth and Tenth Circuits.

The first case to consider this strain of vouching was *United States v. Rudberg*, 122 F.3d 1199 (9th Cir. 1997). In that case, the prosecutor elicited testimony from an FBI agent on re-direct concerning the Rule 35(b) process used for two key witnesses. After an agent testified that the witnesses' plea agreements contained a "truthfulness" clause, the prosecutor led the agent into testifying that he had personally "evaluate[d] their cooperation" and "would rely on" their statements because they "prove[d] out to be accurate." *Rudberg*, 122 F.3d at 1201. The agent then testified that, based on the information the witnesses provided, a Rule 35 motion had been filed *and granted*. *Id.* The prosecutor also elicited similar testimony from at least two witnesses, *i.e.*, that after telling the "truth," the witnesses received a sentence reduction from the court. *Id.* at 1202-03. Although defense counsel neither objected nor requested any curative instruction later, the court reversed under a plain error standard because "the testimony of the vouched witness . . . . was critical to the government's case." *Rudberg*, 122 F.3d at 1205-06. *Cf. United States v. Brooks*, 508 F.3d 1205 (9th Cir. 2007) (declining to reverse similar vouching for plain error where "the prejudice from [the] vouching was reduced by curative instructions wisely given twice by the district court").

In *United States v. Harlow*, 444 F.3d 1255 (10th Cir. 2006), the Tenth Circuit also prohibited this new form of vouching. *Harlow* was a drug case in which the government at trial relied upon five accomplice witnesses who testified pursuant to plea agreements, three of whom had already received sentence reductions under Rule 35(b). The prosecutor then introduced the plea agreements of these three witnesses, all of which referred to requirements of cooperation

and truthfulness and the government's discretion to file motions to reduce their sentences under Rule 35(b), as well as orders granting the reductions based upon prior testimony. From opening statement to summation, defense counsel attacked the credibility of these witnesses, arguing that each knew "what he needs to do here in Wyoming to help himself out." *Harlow*, 444 F.3d at 1259. In rebuttal, the prosecutor referred to the law permitting sentence reductions under Rule 35(b) and then added: "But what's really important, and you can have a chance to take a look at this, you've got the orders reducing their sentences signed by the judicial branch, Judge Johnson." *Id.*

The trial judge, Judge Johnson, issued jury instructions (similar to the instructions issued in *Dohan*) that cautioned the jury to view an accomplice's testimony with caution. *Id.* at 1259-60. Defense counsel, however, requested an additional, curative instruction to counter the impression that Judge Johnson had found the witnesses credible. Judge Johnson agreed and told the jury:

> There was reference made to me having signed an order approving a plea agreement by and between the parties. I'd explain to you that I review plea agreements and decide whether or not they violate any public policy as part of the duties that the judge has in every case. I don't vouch for the credibility of any of the witnesses who have appeared here before this court. That is your job. That is not my job. And I don't make that decision in a case. You're the ones who see the witnesses testify, consider their testimony and, under the instructions of the Court, are the

> judges of the facts and the weight and credibility of the witnesses.

Id. at 1260.[9]

The jury deliberated only three hours before convicting Harlow. *Id.* On appeal, however, the Tenth Circuit, relying on *Rudberg*, found that the prosecutor's use of the judge's role in the Rule 35 process constituted improper vouching:

> The provision [of the plea agreement] makes clear that a sentence reduction occurs as a result of the district court's evaluation of the testimony based on factors such as the "truthfulness, completeness, and reliability," of the testimony. The award of a reduced sentence presented to the jury in the form of a sentence reduction order confirms that a judge has found the witness' testimony truthful. *See* [*Rudberg*]. The fact that the judge who authorized the sentence reduction is the same judge presiding over the trial only underscores the problem. Therefore, we must conclude that it was error to allow the prosecutor to introduce the plea agreements in conjunction with the Rule 35(b) motions and the sentence reduction orders.

Id. at 1264. The Tenth Circuit did not reverse Harlow's conviction because the three witnesses, by "Harlow's own admission . . . were not the core of the government's case," only "provided background testimony" and because the curative instruction "clearly apprised the jurors of the court's limited involve-

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[9] The district court in this case refused to give a similar instruction.

ment" in determining the "credibility of the witnesses. *Id.* at 1264-65.

Gilliland's plea agreement was not materially different from the ones described in *Rudberg*, *Brooks* and *Harlow*. It too required truthfulness and cooperation and contained a paragraph describing the operation of Rule 35. (DE131:6.) And, here also it was the prosecutor who first injected Gilliland's plea agreement into the case. After then eliciting that Gilliland had received a Rule 35 reduction, the prosecutor moved on to her questions that misled the jury into believing Gilliland was now testifying only because of a government subpoena. *See* p. 8 *supra*. Defense counsel's cross-examination of Gilliland was no more improper than counsel's cross in *Harlow*. On redirect, the prosecutor then elicited that Judge Collier himself had granted the reduction *after* hearing Gilliland testify "under oath in this court." The Eleventh Circuit's holding that this conduct was "not improper" stands in direct conflict with the holdings in *Rudberg*, *Brooks* and *Harlow*.

CONCLUSION

For the forgoing reasons, the Petitioner respectfully requests that his Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be granted.

Respectfully submitted,

G. RICHARD STRAFER *
G. RICHARD STRAFER, P.A.
201 South Biscayne Boulevard
Suite 1380
Miami, FL 33131
(305) 374-9091

* Counsel of Record

APPENDIX

APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed November 28, 2007]

No. 06-14320
D.C. Docket No. 00-00048 CR-3-008-LAC

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WILLIAM SCOTT DOHAN,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida

(November 28, 2007)

Before ANDERSON and PRYOR, *Circuit Judges*, and ALBRITTON,* *District Judge*.

PER CURIAM:

William Scott Dohan appeals his conviction and sentence of 156 months of imprisonment for conspiracy to commit wire fraud and security fraud, and for

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* Honorable W. Harold Albritton, III, United States District Judge for the Middle District of Alabama, sitting by designation.

conspiracy to engage in or attempt to engage in money laundering, all involving a multi-defendant "Ponzi scheme." 18 U.S.C. § 371; 18 U.S.C. § 1956(h). Dohan argues that (1) the prosecutor elicited and exploited false testimony from coconspirator B. David Gilliland, regarding his plea agreement obligations; (2) the prosecutor impermissibly used religious and other "vouching" to bolster Gilliland's credibility; (3) the district court abused its discretion by barring evidence of Gilliland's net profits from the conspiracy; (4) the district court abused its discretion by rejecting a series of requested jury instructions concerning judicial neutrality, religious beliefs, witness perjury, and a "good faith" theory of defense; and (5) the cumulative impact of these same errors requires reversal. Finally, Dohan argues that his conviction for conspiracy to launder money must be reversed due to the omission in the court's instructions to the jury of "willfulness" as an essential element of that crime. After careful consideration, we affirm Dohan's convictions and sentence.

First, Dohan argues that the government improperly solicited, failed to correct, and exploited false testimony from Gilliland to the effect that, having completed his term of imprisonment, he was testifying of his own volition. Dohan contends that this suggested that he was no longer obligated under his plea agreement to appear and testify, even though the government knew that he was still on supervised release. Solicitation of or failure to correct false testimony requires a new trial only if such testimony "could . . . in any reasonable likelihood have affected the judgment of the jury." *Giglio v. United States*, 405 U.S. 150, 153 (1972). As Dohan did not object to the testimony at trial, we additionally review for plain error. *Johnson v. United States*, 520 U.S. 461, 466-67

(1997); *United States v. Nixon*, 918 F.2d 895, 905 (11th Cir. 1990).

Gilliland's testimony was not patently false. Regardless of any technical obligations under the plea agreement, the prosecution's questions went to the more relevant credibility issue of Gilliland's *beliefs* regarding his obligations under the plea agreement, and thus his motivation to appear and testify truthfully. The agreement was made available to defense counsel long before trial, and he vigorously cross-examined Gilliland with respect to other portions of the plea agreement, but did not cross-examine him with respect to his belief regarding any consequences if he failed to testify. This court concludes that there was no error, and certainly none so plain and obvious that it affected Dohan's "substantial rights" or the "fairness, integrity, or public reputation of judicial proceedings." *See Johnson*, 520 U.S. at 469-70.

Second, Dohan argues that the government improperly "vouched" for the credibility of Gilliland's testimony by suggesting it had been "checked" by the prosecutor, and also by the judge in earlier reducing Gilliland's sentence for giving substantial assistance, and violated FED. R. EVID. 610 by soliciting comments from Gilliland about being a "moral, Christian man."

Whether the government has improperly vouched for a witness's credibility is a mixed question of law and fact subject to plenary review. *United States v. Ayster*, 948 F.2d 1196, 1206 (11th Cir. 1991). Viewing the comments referred to involving checking on the witness's story and the earlier sentencing of the witness in the context of the witness's overall testimony, we conclude that they neither were improper nor prejudicially affected the substantial rights of the defendant. *Id.* We find no error.

Dohan's contention that comments by Gilliland that he was a "moral, Christian man" violated FED. R. AVID. 610 fails. The government did not elicit the testimony on direct examination. The unsolicited comment came from the witness upon the prosecution's redirect examination, responding to defense counsel's having questioned him on why the jury should believe him at trial when he had previously committed perjury and other bad acts. Further questions by the prosecution were not for the purpose of showing that the witness's credibility was enhanced by his religious beliefs. At no time did defense counsel object, but instead attempted upon recross to ask his own impermissibly religious question. Furthermore, the government agreed not to mention the unsolicited religious reference in its closing argument, where it even invited the jury to disregard Gilliland's entire testimony if it wished, and convict on other evidence. The court concludes that there was no plain error.

Third, Dohan argues that the district court erred by excluding a chart and testimony from a witness showing Gilliland's net profits from the Ponzi scheme as compared to his own. A district court's evidentiary rulings are reviewed for abuse of discretion. *United States v. Baker*, 432 F.3d 1189, 1202 (11th Cir. 2005), *cert. denied*, 126 S.Ct. 1809 (2006). District courts are well within their discretion to exclude even relevant evidence for undue delay, waste of time, or needless presentation of cumulative evidence. FED. R. EVID. 403. Defense counsel was free to compare the relative profits in his closing argument based on other admitted evidence, without the benefit of the excluded chart and testimony. The government indicated that inclusion of the chart and testimony would require it

to conduct extensive cross-examination. The district court did not abuse its discretion by excluding it.

Fourth, Dohan argues that the court erred in rejecting a series of four requested jury instructions. Reviewed for abuse of discretion, failure to give a requested instruction is reversible only where the instruction "(1) was correct, (2) was not substantially covered by a charge actually given, and (3) dealt with some point in the trial so important that failure to give the requested instruction seriously impaired the defendant's ability to conduct his defense." *United States v. Ackhardt*, 466 F.3d 938, 947-48 (11th Cir. 2006) (internal citations omitted). Reviewing the jury instructions actually given, as a whole, this court will reverse the district court only if we are left with a substantial, ineradicable doubt as to whether the jury was properly guided in its deliberations in this regard. *Id.* at 948. Here, we have no such doubt.

Dohan's requested instruction regarding judicial neutrality was substantially covered by the judge's modified instruction that the jury should disregard anything the judge may have "said or done before or during the trial." Since we conclude that FED. R. AVID. 610 was not violated by religious remarks, there was no abuse of discretion in refusing to give the requested Rule 610 instruction. The court's instructions regarding what to consider in judging witness credibility, including directions to view plea agreement testimony with greater caution, adequately substituted for the requested "prior perjury" instruction, and rendered it unnecessary. *See United States v. Shearer*, 794 F.2d 1545, 1551 (11th Cir. 1986). Finally, Dohan argues that the court erred in refusing to allow Dohan's requested "good faith" theory of defense instruction, which emphasized the

objective factors of repayment and lack of profit as indicating lack of intent. As the actual jury instruction adequately informed the jury's good faith analysis, there was no reversible error leaving a substantial, ineradicable doubt as to whether the court's instructions properly guided the jury's deliberations. *Puche* at 1148. In sum, the court did not abuse its discretion by refusing the four requested jury instructions.

Fifth, Dohan contends that the "cumulative impact" of the aforementioned errors requires reversal. The cumulative impact of multiple evidentiary and instructional errors are reviewed *de novo*, although some of the errors might individually be reviewed for plain error. *United States v. Hands*, 184 F.3d 1322, 1334 (11th Cir. 1999) (internal citations omitted). The government dismisses Dohan's contention, arguing that there were no individual errors, much less harmless errors that might cumulatively rise to the level of reversible error. This Court recognizes that "the combination of prosecutorial misconduct and improper judicial conduct can, in an extreme case, deny a defendant a fair trial." *United States v. Alkins*, 885 F.2d 775, 787 (11th Cir. 1989). There was no such misconduct here, however, and the cumulative impact of the matters argued by Dohan do not come close to requiring a reversal.

Finally, Dohan argues that the district court erred in denying his motion to instruct the jury that "willfulness," or specific intent, was an essential element of the crime of money laundering conspiracy, 18 U.S.C. § 1956(h), as shown in this circuit's applicable pattern jury instruction. The district court concluded that only general intent, or "knowledge" was required, and modified the second element language

from the pattern jury instructions for § 1956(h). *See Eleventh Circuit Pattern Jury Instructions (Criminal Cases) 70.5 (2003).* The pattern instruction as to what must be proved for conviction under § 1956(h) includes:

> Second: that the defendant, knowing the unlawful purpose of the plan, willfully joined in it.

Id.

The district court gave Pattern Jury Instruction 70.5 in its entirety except that it modified the second required element of the offense to read:

> Second, that the defendant knowingly and voluntarily joined or participated in the conspiracy.

The pattern jury instructions are drafted by a committee of district judges appointed by the Chief Judge of the Circuit and adopted by resolution of the Judicial Council of the Eleventh Circuit. Although generally considered "a valuable resource, reflecting the collective research of a panel of distinguished judges," they are not binding; Eleventh Circuit case law takes precedence. *United States v. Polar*, 369 F.3d 1248, 1252-53 (11th Cir. 2004); *United States v. Veltmann*, 6 F.3d 1483, 1492 (11th Cir. 1993); Judicial Council of the Eleventh Circuit Resolution ("[T]he content of such instructions . . . must await case by case review by the Court.").

The district court correctly instructed the jury, notwithstanding the pattern jury instructions, that the appropriate mental state for convicting under § 1956(h) was merely "knowing and voluntarily," as we have held in cases post-dating the adoption of the pattern instruction. *See, e.g., United States v. Kennard*, 472 F.3d 851, 856 (11th Cir. 2006) ("know-

ingly and voluntarily participated in the agreement"); *United States v. Silvestri*, [illegible] Cir. 2005) ("knowingly and voluntarily joined or participated in the conspiracy"). To that extent, Pattern Jury Instruction 70.5 places a higher burden on the government for proving an offense under 18 U.S.C. § 1956(h) than does the statute, and should not be used. The district court, therefore, committed no error in its instruction which modified the pattern one.

For all of the reasons discussed above, Dohan's conviction and sentence are AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed January 03, 2008]

No. 06-14320-HH

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WILLIAM SCOTT DOHAN,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Florida

Before: ANDERSON and PRYOR, *Circuit Judges*, and ALBRITTON,* *District Judge.*

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ R. Lanier Anderson
UNITED STATES CIRCUIT JUDGE

* Honorable W. Harold Albritton, III, United States District Judge for the Middle District of Alabama, sitting by designation.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

[Filed August 21, 2000]

Case No.: 3:00cr48/LAC

UNITED STATES OF AMERICA

v.

BENJAMIN DAVID GILLILAND

PLEA AND COOPERATION AGREEMENT

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1. PARTIES TO AGREEMENT

This agreement is entered into by and between BENJAMIN DAVID GILLILAND, Donald L. Beckner, Attorney for the defendant, and the United States Attorney for the Northern District of Florida, This agreement specifically excludes and does not bind any other state or federal agency, including other United States Attorneys Offices and the Internal Revenue Service, from asserting any civil, criminal or administrative claim against the defendant.

2. TERMS

The parties agree to the following terms:

a. The defendant will plead guilty to Counts One and Two of the Indictment, Count One charges the defendant with conspiracy to commit wire and secu-

rities fraud. Count Two charges the defendant with conspiracy to commit money laundering. On Count One the defendant faces a maximum possible penalty of 5 years, a fine of up to $250,000.00, a three-year term of supervised release, and a $100.00 special monetary assessment. On Count Two the defendant faces a maximum possible penalty of 10 years imprisonment, a fine up to $250,000.00, and a 5-year term of supervised release, and a $100.00 special monetary assessment. The defendant agrees to pay the assessment prior to sentencing. If defendant is unable to pay the special assessment, the defendant agrees to execute, prior to sentencing, the necessary paperwork to establish his indigency. If the defendant is indigent, the defendant agrees to participate in the Inmate Financial Responsibility Program.

b. The parties acknowledge that the Sentencing Guidelines apply. The District Court's discretion, in sentencing is limited only by statutory provisions and the Sentencing Guidelines.

c. That by voluntarily pleading guilty to Counts One and Two in the Indictment herein, the defendant, as to the Counts pled herein, knowingly waives and gives up his constitutional rights to plead not guilty, to compel the Government to prove his guilt beyond a reasonable doubt, not to be compelled to incriminate himself, to confront and cross-examine the witnesses against him, to have a jury or judge determine his guilt on the evidence presented, and other constitutional rights which attend a defendant on trial in a criminal case.

d. The Defendant limes to cooperate fully and truthfully with the United States Attorney and his designated representatives and any agencies which the United States Attorney directs. Such cooperation

shall include but is not limited to complete and truthful debriefings and testimony at grand jury, trial, or as otherwise requested involving any matters under investigation.

e. The defendant agrees to make restitution to all victims to the best of his ability.

f. The defendant agrees to provide any and all information in his possession regarding assets which may he used or sold to reimburse the victims to the Securities and Exchange Commission Receiver, Michael J. Quilling. The defendant shall take all steps necessary to transfer these assets to the Receiver, including but not limited to executing any documents, providing consent to a cause of action filed by the Receiver, providing information and supporting documentation within the defendant's possession or control, and inducing persons holding property on the defendant's behalf to transfer such property to the Receiver. Upon satisfaction of the Receiver that all efforts have been made to identify and surrender assets, the United States agrees to move for dismissal of the forfeiture count in the Indictment.

g. The defendant hereby specifically waives any Fifth Amendment privilege or any other privilege inconsistent with the cooperation required by this agreement.

h. If all terms and conditions of this agreement are satisfied and there exists no cause for revocation as outlined in Section 3, any statements made by the defendant pursuant to this agreement, except as provided by guideline U.S.S.G., Section 1B1.8, will be treated by the United States as given under Rule 11(e), Federal Rules of Criminal Procedure.

i. Upon the District Court's adjudication of guilt of the defendant for violations of Title 18, United States Code, Section 371, Conspiracy to Commit Wire and Securities Fraud, and Section 1956(h). Conspiracy to Commit Money Laundering, the United States Attorney, Northern District of Florida, will dismiss the remaining counts of the Indictment against the defendant and will not file any further criminal charges against the defendant arising out of the same transactions or occurrences to which the defendant has pled, The defendant agrees that the government at all times during this investigation and prosecution has proceeded in good faith and that substantial evidence existed to support all dismissed counts.

j. The United States Attorney agrees to make known his opinion as to the nature and extent of defendant's cooperation.

k. Regardless of any prior representations, the United States Attorney will not agree to recommend or he bound to recommend a specific sentence. Both parties may advise the District Court and other authorities of their versions of the offense committed by the defendant and may argue positions under the sentencing guidelines, including arguing for departures.

l. Nothing in this agreement shall protect the defendant from prosecution for any other offense committed if such offense is not otherwise covered by this plea agreement. Such offenses include offenses committed while the defendant cooperates under this agreement. Should the defendant be charged with any offense alleged to have occurred after the date of this agreement, the information and evidence disclosed to the Government during the course of

cooperation can be used against the defendant in any such prosecution.

m. The defendant is pleading guilty because the defendant is in fact guilty of the charges contained in Counts One and Two of the indictment, In pleading guilty, the defendant acknowledge: that were the case to go to trial, the government would present evidence in support of these/this chargers), as set out in the government's written Factual Basis for Plea. The parties agree that either party may offer additional evidence relevant to sentencing issues and that the court may consider an relevant evidence and is not limited to the written Factual Basis attached hereto.

3. REVOCATION

a. The parties agree that the United States Attorney may revoke this agreement upon showing, by a preponderance of the evidence, any of the following:

1 Defendant's failure to cooperate as provided by this agreement;

2. Defendant's statements or testimony are incomplete or untruthful;

3 Defendant's failure to comply with any of the terms of this agreement;

4. Defendant has any criminal liability for homicide;

5. Defendant has engaged in further criminal conduct after the defendant begins cooperating with the government in this case.

b. If this agreement is revoked,

1. Any plea of guilty entered by the defendant pursuant to this agreement and any judg-

ment entered thereon shall remain in full force and effect and will not be the subject of legal challenge by defendant.

2. The United States may reinstate charges previously dismissed pursuant to this agreement and may otherwise file charges without limitation by this agreement.

3 All statements, information, and other evidence provided by the defendant pursuant to this agreement may be used against the defendant in any subsequent prosecution.

4. Regardless of the defendant's cooperation. and at the sole discretion of the United States Attorney, the defendant may be deemed not to have provided substantial assistance.

4. SENTENCING GUIDELINES

a. The parties understand and agree that the District Court will make the final determination of facts as to any sentencing issue. Adverse rulings or a sentence greater than anticipated shall not be grounds for withdrawal of the defendant's plea. The Court is not limited to consideration of the facts provided by the United States Attorney and/or the defendant.

b. The defendant understands that any prediction of his sentence by any person is not a guarantee or binding promise.

c. If, in the sole discretion of the United States Attorney, the defendant is deemed to have provided substantial assistance in the investigation or prosecution other persons who have committed offenses, and has otherwise complied with all terms of this

agreement, and such assistance is prior to sentencing or within the time provided by Rule 35, Federal Rules of Criminal Procedure, then the United States Attorney will file an appropriate substantial assistance motion. Determination whether the defendant has provided substantial assistance will not depend upon any charges being filed or convictions being obtained as a result of defendant's cooperation. Should such a motion be filed, the United States Attorney may choose in his absolute discretion to file a motion under Title 18 U.S.C. Section 3553, or under Sentencing Guidelines Section 5K1.1, or under both provisions. Should a motion be filed, the granting of relief and the extent of relief is left solely to the discretion of the District Court.

d. The parties reserve the right to appeal any sentence imposed.

CONCLUSION

There are no other agreements between the United States Attorney, Northern District of Florida and the defendant, and the defendant enters this agreement knowingly, voluntarily and after consulting with counsel.

P. MICHAEL PATTERSON
United States Attorney

/s/ Donald L. Beckner
DONALD L. BECKNER
Attorney for Defendant

/s/ Benjamin David Gilliland
Defendant

8/21/00
Date

/s/ Michelle M. Heldmyer
Michelle M. Heldmyer
Florida Bar #616214
Northern District of Florida
21 East Garden Street
Pensacola, Florida 32501
(904) 444-4000

8/21/00
Date

FACTUAL BASIS

In 1996, defendants BENJAMIN DAVID GILLILAND, Jerrold Gunn, William Dohan, and .others developed Hammersmith Trust, LLC represented to be a 13-month investment program designed to yield huge annual profits, sometimes over 700% interest per year. Investors were told before and after the investment process that: (1) their funds (called loans to avoid securities laws) went into Master accounts managed by an attorney, David Johnson, called an independent Trustee of Hammersmith, and would never leave the United States; (2) Hammersmith would use their funds to purchase U.S. Government Treasury Bills, which were absolutely safe and backed their investment in full; (3) Hammersmith would provide the investors with the CUSIP identifying numbers of the Treasury Bills Hammersmith had purchased with their funds; (4) Hammersmith would use the Treasury Bills as "leverage" to invest in the program; and (5) Hammersmith would pay investors interest payments every few months, at rates of return as high as 60% per month for as long as the investors left their funds in the program.

The program was bogus. The defendants did purchase a few Treasury Bills (only on 10% margin, which rendered them nearly valueless) and provided a CUSIP number from such a Treasury Bill to each investor, fraudulently representing that the investor's total funds invested were used to purchase that particular Treasury Bill. The same CUSIP numbers were used numerous times.

The defendants developed Microfund, Inc., as well. The Microfund program was nearly identical to the Hammersmith program in that it promised absolute safety for investors. In addition, the defendants

represented that the Microfund program offered a heightened level of security. Before investor funds were invested, they would be held by Landfair Custodial Services, Inc., an independent custodian operated by former banker and codefendant Melody Rose. According to the Principals, this Custodian served a purpose similar to the attorneys in Hammersmith who handled the escrow accounts, that is, to ensure that all interests, including the investors', were protected in the transaction. In fact, Rose was anything but an independent custodian. Rose was in partnership with GILLILAND and Bridgeport to run the custodial service for the Microfund program. She worked at his pleasure and took direction from GILLILA.ND, and her office was adjacent to the Bridgeport Alliance office, where the defendants worked.

In order to facilitate. the collection of monies for these programs, in 1997 GILLILAND and codefendants created Bridgeport Alliance, LLC, a limited liability company with offices at 4565 Commercial Drive, Bluewater Bay, Florida, run by codefendants William West and Kenneth Cobb, Bridgeport was an investment company through which the defendants offered the Hammersmith Trust and Microfund programs Bridgeport contracted with agents and investors to fund Hammersmith, Codefendants Phillip Nesmith and Jeffery Matz were two such agents who brought millions of dollars into the programs knowing that the programs were bogus.

The programs were further facilitated by the purchase of a bank, American Pacific Bank: and Trust; operated and partly owned by codefendant David Bishara. The defendants used the bank to launder investor funds (primarily Microfund investments) off-

shore. As part of this endeavor, the GILLILAND and others created another bogus program, Luxor Capital Markets, Inc. A Luxor escrow account was established by codefendant Mark D. Talley, who laundered Microfund monies through the account to pay GILLILAND's hills and make payments to other investors.

The investment opportunities were a "Ponzi" scheme in which few investments, were made but some funds collected from investors were distributed to select other investors based upon benefit to the scheme. For .example, individuals who could potentially bring large numbers of new investors into the scheme received payments, sometimes at very high rates of return. Also, individuals who complained frequently or threatened exposure of the scheme received payments. Investor funds were not safe, and many investors lost all or part of their monies without realizing any profit The promises made to investors, such as the purchase of safe T-Bills, the security of insurance policies and bonds, the use of "Trustees" and "Custodians," and the association of Several attorneys such as codefendants Jerrold Gunn, David Johnson and Mark Talley, were all merely "sales tools" to lure investors' money to the defendants.

During the course of the scheme, nearly all monies invested in Hammersmith and Microfund were wire transferred from bank to bank, state to state and out of the United States. Most involved sums over $10,000.00. The investments were legally considered to be securities sales, as defined and used in Title 15, United States Code.